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Introduction: What Does Oakley Tell Us About the Failures of Constitutional Decision-Making?

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ARTICLES

INTRODUCTION: WHAT DOES *OAKLEY* TELL US ABOUT THE FAILURES OF CONSTITUTIONAL DECISION-MAKING?

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As the articles in this symposium illustrate, the Wisconsin Supreme Court's decision in *State v. Oakley*,[1] in which the court upheld a probation order prohibiting Mr. Oakley from fathering additional children until he could support them,[2] is a compelling

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1. State v. Oakley, 629 N.W.2d 200 (Wis. 2001). Mr. Oakley, the father of nine children, failed to pay any child support during the relevant time period and was in arrears in excess of $25,000. *Id.* at 201-02. Mr. Oakley challenged the constitutionality of the condition of his probation that he not father another child unless he could show that he could support that child and his current children, arguing that the condition violated his right to procreate. *Id.* at 201. The Wisconsin supreme court held that the probation condition was not overbroad, as it did not eliminate Oakley's ability to exercise his constitutional right to procreate. *Id.* at 212-213. The court found that Mr. Oakley could satisfy the condition of probation by making efforts to support his children as required by law. *Id.* at 212. The condition was reasonably related to the probationary goal of rehabilitation because it would assist Oakley in conforming is conduct to the law. *Id.* at 213. Further, the condition was determined to be narrowly tailored to serve the compelling state interest of requiring parents to support their children as well as rehabilitating those convicted of crimes. *Id.*

2. The precise terms and potential effects of the order are contested.

example of a troubling flaw in our constitutional jurisprudence. Absent the countervailing check perhaps provided by the doctrine of unconstitutional conditions,[3] each path of doctrinal analysis, considered separately, arguably leads to the conclusion that the probation order is valid. This is so even though a number of institutional, structural, and process-based considerations converge to render the order's constitutionality highly suspect. The prevailing doctrinal approach is to disaggregate the case into distinct lines of argument. Do the poor constitute a *"discrete and insular minority"?* The articles by Professors Richard Cole, David Papke, and Bruce Miller take up the challenge of considering historical, legal, and cultural approaches to poverty. *Are probation conditions subject to heightened scrutiny?* Professor Jennifer Levi argues, in part, that even a radical change in the standard of review would not change the outcome of either the majority or dissenting opinions. *Is this a case involving discrimination based on sex?* Professor Jennifer Martin considers the impact that the Oakley decision may have on women, especially those subject to domestic violence.

How is it possible that the machinery of constitutional interpretation gave us this result? These articles suggest that there is no single answer. In fact, one failing of our current mode of constitutional inquiry is apparently that the legal analysis tends to consider only one variable at a time. Each of the individual inquiries above me be rejected in turn, without consideration of the interconnected and overarching issues raised by the case. This symposium provides us with the opportunity to do just that. Taken as a whole, the articles raise even larger, more systemic concerns. What is the judiciary's role in interpreting the Constitution? Is it relevant that the claimed violation stems from a judicial, rather than legislative act? How should the Constitution safeguard the rights of the least empowered in society? Because only one other case to date has upheld restrictions on procreation as a condition of probation,[4] the Oakley decision could be dismissed as nothing more than an aberrant result from the supreme court of a single state. As these articles demonstrate, however, the questions raised by Oakley are precisely some of the central concerns that underlie the Constitutional project itself.

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3. There is a strong argument that the doctrine f unconstitutional conditions applies in *Oakley*. *See generally* Jennifer Levi, *Probation Restrictions Impacting the Right to Procreate: The* Oakley *Error*, 26 W. NEW ENG. L. REV. 78 (2004).

4. *See* Levi, *supra* note 3, at 88-89.

In considering the clash of liberty (or liberties) in Oakley, Professor Richard Cole rejects the classic liberal constitutional focus on the protection of individual autonomy from intrusion from the state. Instead of assuming that individual and community interests necessarily diverge, Professor Cole looks to Biblical and Talmudic law and ponders whether preferable resolutions may be possible in Mr. Oakley's situation using Jubilean principals of liberation and empowerment.[5] The Jubilean Year, described in the Old Testament, envisioned a radical socio-economic transformation. Conceived of as a sabbatical year to occur once every half century, the Jubilee Year was meant to liberate citizens from forms of bondage-debt and slavery. While the Jubilean liberation was a radical act, it was also a conservative movement with the goal of restoring traditional community. For Cole, the potential of Jubilean principles rests in the joinder of individual freedom with the needs of the wider community.

Viewing Mr. Oakley's poverty as a form of bondage, Professor Cole considers what the application of Jubilean principles might mean for David Oakley. Cole posits that, using a Jubilean approach, judges and other lawmakers would attempt to empower the individual by considering his or her social, economic, and cultural circumstances. Analogizing redistribution of land in the Mosaic world to the contemporary emphasis on education as the key to economic independence; Cole states, for example, that lawmakers should allocate greater community resources towards education, job training, and financial support.[6] Because the purpose of the Jubilean approach is to empower individuals by removing obstacles that impede success (rather than to coerce conformity with particular standards of conduct, as under the criminal system), the Jubilean model may give individuals an opportunity to flourish, and, hopefully, to give back to the community that has supported them.

The article by Professor David Papke ties in nicely with Professor Cole's consideration of empowerment. Professor Papke criticizes the assumption, which he finds in the *Oakley* majority and dissenting opinions, that "Oakley is an agent rather than a victim of poverty."[7] Mr. Oakley, born in the prison where his mother was incarcerated, had repeated run-ins with the police from a young

5. *See* Richard P. Cole, *Liberation and Empowerment: A Jubilean Alternative for* State v. Oakley, 26 W. NEW ENG. L. REV. 27 (2004).

6. *Id.* at 59-63.

7. *See* David Ray Papke, State v. Oakley, *Deadbeat Dads, and American Poverty*, 26 W. NEW ENG. L. REV. 26 (2004).

age. With Mr. Oakley's story in mind, Professor Papke considers the development of child support law and the current legal focus on so-called "deadbeat dads." Papke concludes that many child support laws reflect an animosity towards non-paying parents with little interest in a parent's actual ability to pay: the statute disparagingly entitled "Deadbeat Parents Punishment Act," for instance, creates a presumption that a delinquent parent is able to pay the support owed.[8] For the Wisconsin Supreme Court, Papke asserts, Mr. Oakley had come to personify not just all "deadbeats" but also the evils associated with poverty itself. Professor Papke compares the individualist notion of self-reliance inherent in the American legal system (which blames the "fault" of poverty on those impoverished) with the structural view of poverty more prevalent in Europe (which posits that the social and governmental systems failed those who are poor). In the end, Papke turns to academics, urging us to move beyond the "sterility" of poverty-related discourse and instead to re-examine our understanding of poverty and its causes.[9]

Professor Bruce Miller takes another look at history. He traces the child support laws under which Mr. Oakley was convicted to the Elizabethan Poor Laws enacted in England during the sixteenth century.[10] By providing a small measure of financial support for those living in poverty, the Elizabethan Poor Laws incorporated the concept of public fiscal responsibility towards the poor while enacting a form of recompense—ostensibly the improved moral character of the impoverished, who were pilloried as "idle vagabonds."[11] The Poor Laws required that recipients engage in "continual labor" or face imprisonment.[12] They also established a set of family law rules unique to the poor. While wealthy or self-supporting parents had no obligation to support their children, parents living in poverty were assessed monthly child support payments.[13] Professor Miller contends that the stigmatic notion of the so-called "welfare queen" continues this ritualized degradation of the poor and functions to deter poor persons from utilizing the assistance available.[14] He also notes that the effects of a poverty-

8. *Id.* at 22-23.
9. *Id.* at 26.
10. Bruce K. Miller, *A Sturdy Rogue*, 26 W. NEW ENG. L. REV. 105 (2004).
11. *Id.* at 111-12.
12. *Id.* at 114.
13. *Id.*
14. *Id.* at 120-21.

based dual system of child support continues, pointing to the 1996 Welfare Reform Act's requirement that the prosecutors pursue non-supporting parents who receive public assistance. Given limited prosecutorial resources, enforcement tends to be aimed at the poor, while middle and high income parents who fail to pay support often escape prosecution. The goal of the Elizabethan Poor Laws and the current welfare system, Miller asserts, extends even further than deterring those is poverty from accessing public support: by punishing the poor, these laws function as a reminder to low wage laborers that there is "a fate worse" than their daily struggles in underpaid and often demeaning jobs.[15]

Professor Jennifer Martin considers another marginalized group, adversely impacted by the *Oakley* decision: women. In fact, there is a significant overlap between these two groups: as the *Oakley* majority makes clear, a disproportionate number of single parents living in poverty are women, and one of the court's primary rationales for its ruling is to help ensure that impoverished women and children receive the support they need.[16] Professor Martin expands upon the dissenting opinions in *Oakley*, which point out that the probation condition involves not only Mr. Oakley's procreative choices but those of his pregnant partner.[17] In addition to creating a situation "coercive of abortion" by conditioning eight years imprisonment of Oakley on the birth of his child, the probation order subjects his partner to potential violence or other forms of intimidation by creating an incentive for Mr. Oakley to demand that his partner terminate her pregnancy.[18] Professor Martin places particular focus on the chain of destructive consequences that may result for victims of domestic violence. An abuser may use every form of physical, economic, and legal coercion available to harass or control his partner. He may coerce her to terminate her pregnancy. If she and the batterer have other children, he may attempt to use the judicial process to fight aggressively for custody. The abuser may harass her at work, making it impossible for her to keep her job; he

15. *Id.*

16. State v. Oakley, 629 N.W.2d 200, 204 (Wis. 2001). For an examination of intersectionality issues and the ways in which the law disaggregates the harms flowing from discrimination based on an individual's membership in multiple oppressed groups, see Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN L. REV. 1241 (1991).

17. Jennifer Martin, *Coercive Abortions and Criminalizing the Birth of Children: Some Thoughts on the Impact on Women of* State v. Oakley, 26 W. NEW ENG. L. REV. 65 (2004).

18. *Oakley*, 629 N.W.2d 200 at 219 (Bradley, J., dissenting).

may seek prosecution under child support laws if she is unable to pay. In effect, an abused woman may be driven into poverty: the *Oakley* decision may be harming the very people whom the court is trying to help.

Professor Jennifer Levi situates the *Oakley* decision in the context of probation conditions imposed nationwide. After surveying probation cases, Professor Levi concludes that although the result in *Oakley* may be unusual, its analytical approach is straightforward and unremarkable. While the majority and dissent appear to presume that the standard of review is the major point of contention, Professor Levi notes that whether applying strict scrutiny or rational basis review, the majority would uphold the probation restriction while the dissent would strike it down.[19] This consistency in outcome, despite the standard applied, leads Levi to search for another explanation for the unusual result in Oakley. She finds her answer in the doctrine of unconstitutional conditions. The doctrine prohibits the state from conditioning a discretionary benefit on the infringement of a fundamental right.[20] The heart of the doctrine of unconstitutional conditions is the premise that the government may not do indirectly that which it is forbidden to do directly. Under the doctrine, Professor Levi reasons, the state may not impose greater restrictions on a probationer's fundamental rights (in the guise of conditioning the "benefit" of probation on the government's impairment of a right) than it could impose on the rights of an incarcerated person. Relying on the Supreme Court decisions *Turner v. Safley* and *Zablocki v. Redhail*, in which the Court struck down restrictions on an inmate's right to marry, Levi concludes that similar infringements on a prisoner's equally fundamental right to procreate would also fail.[21] Because the ban on Mr. Oakley's ability to procreate would be unconstitutional if applied to Mr. Oakley as an inmate, then under the doctrine of unconstitutional conditions, Professor Levi concludes, the infringement must fail when applied to him as a probationer.

Each of these articles implicates a broader, institutional difficulty: the failure, not limited to the *Oakley* court, to consider in any meaningful way the role of judicial decision-making in the context of probation. While courts have rejected arguments urging height-

19. Levi, *supra* note 3, at 92-93.

20. *Id.* at 100.

21. *Id.* at 98-100 (discussing Turner v. Safley, 482 U.S. 78 (1987), and Zablocki v. Redhail, 434 U.S. 374 (1978)).

ened review of probation orders, the typical considerations that provide the basis for judicial restraint are largely absent for the review of probation orders. In contrast to review of legislative or administrative actions, in which judicial deference to the decisions of co-equal branches of government is generally warranted, probation orders do not directly raise separation of powers concerns. Probation conditions are often set by a lower court judge who has largely unfettered discretion in crafting her order. Unlike legislation, which reflects the will of the majority arrived at via the democratic process, a probation order (at its worst) may be little more that the imposition of the idiosyncratic preferences of an individual judge. Moreover, the judicial deference normally granted to prison officials is not appropriate for probation orders. Probation orders not only originate from the same governmental branch that later reviews them: the orders are issues by the very branch presumably lacking the specialized expertise that is the basis for deference to prison authorities.

Another consideration that militates towards exercising greater judicial solitude is the obvious concern that a constitutional right is at stake. Without rehashing the arguments in *Oakley* regarding whether the right to procreate necessarily requires the application of strict scrutiny, a quick reference to *Marbury v. Madison* should be a sufficient reminder that it is particularly within the province of the judiciary to safeguard constitutional rights.[22] Nor is this just any old "bargain basement" constitutional right. The right to reproductive freedom is among the most culturally important and embattled of our constitutional guarantees—one need only follow the nomination process for the federal bench for evidence of its significance.[23] As Professor Martin discusses—and as is suggested by the gender split among the *Oakley* jurists (with the four male justices voting to uphold the constitution and the three female justices voting to strike it down)—it is also a right that implicates sex equality concerns. In particular, the possibility that Mr. Oakley might attempt to control his partner's reproductive decisions is precisely the outcome the Supreme Court prohibited in the context of spousal consent requirements for abortion in *Planned Parenthood v. Casey*.[24] Even though it did not undertake a traditional sex discrimination

22. Marbury v. Madison, 5 U.S. 137 (1803).

23. A federal judicial nominee's (dis)agreement with Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 503 U.S. 833 (1992), is often considered to be a litmus test for the likelihood of a nominee's Congressional confirmation.

24. *Casey*, 505 U.S. at 888-89.

analysis, the Court's nullification of the spousal consent requirement reflected a rare recognition by the Court of the entrenched inequalities of gendered power. It is also an even rarer, albeit indirect, implementation of the process and anti-subordination concerns emanating from that most famous of dicta, *Carolene Products'* footnote four.[25] Similarly, the *Oakley* court could have struck down the probation order (without the necessity of holding that this was a sex discrimination case, *simpliciter*) on the ground that the order may impermissibly result in the subjugation of Mr. Oakley's female partners through violence and the loss of reproductive control.

A final factor militating towards heightened judicial solicitude is that Mr. Oakley, like many probationers, lives in poverty, as do the women with whom he has had relationships, and the children they have borne. Does the Wisconsin Supreme Court's decision create the reproductive equivalent of a debtor's prison? The answer appears to turn on the interpretation of the probation order: does it, as the order's language suggests, prohibit Mr. Oakley from fathering children until he can support all of them, or does it, as the majority concludes, require him to make some effort to pay?[26] The latter implies that Mr. Oakley "holds the key" and could avoid the restriction by paying what he can afford. The former effectively operates as an absolute ban on future procreation because the facts indicate that Mr. Oakley is unable to fully support his children.[27] I would argue that the "correct" answer to this question is less important than the question itself. When a right so integral to our individual autonomy could be completely barred, consideration of the judiciary's role suggests that it err on the side of ensuring constitutional protections. Even though the Supreme Court has long refused to grant increased scrutiny of governmental action that unduly burdens the poor,[28] the discussions by Professors Papke and Miller concerning the historical and ongoing hostility to the poor demonstrate that the process concerns animating footnote four apply with particular force to those living in poverty.

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25. United States v. Carolene Products Co., 304 U.S. 144, 152, n.4 (1938).

26. State v. Oakley, 629 N.W.2d 200, 202-03.

27. *Id.* at 208.

28. San Antonio Indep. School Dist. V. Rodriguez, 411 U.S. 1 (1973) (rejecting the proposition that wealth-based classifications are suspect). For a critique of the Supreme Court's reasoning in this case, see Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461 (2003).